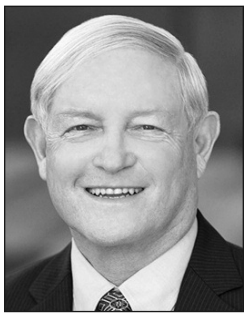
ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl REPORT
LOS ANGELES
SUMMER 2017

NEW WARP-SPEED APPELLATE PROCESS FOR ELDER ABUSE CASES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The Legislature Discerns A Problem With Appeals From Certain Orders Denying Petitions to Compel Arbitration.

Compared with trial court proceedings, appeals often proceed at a leisurely pace. Until recently, this was true of appeals from orders dismissing or denying petitions to compel arbitration. These are appealable orders (Code Civ. Proc., § 1294, subd. (a)), and an appeal stays all proceedings in the trial court until the appellate result is final (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 190). In the ordinary course, the unsuccessful petitioner would have 60 days or more to file an appeal (Cal. Rules of Court, rules 8.104, 8.108); preparation of the appellate record could take months; and, although arbitration proceedings are supposed to have preference (Code Civ. Proc., § 1291.2) and the Court of Appeal can grant a preference (Cal. Rules of Court, rule 8.240), it may still take many more months or even years to reach a decision (e.g., *Young v. Horizon West., Inc.* (2013) 220 Cal.App.4th 1122, 1126 [even with preference, unsuccessful appeal took almost a year and a half]).

No more. Having found that delays can be problematic in elder abuse litigation, the Legislature has carved out certain cases for rocket-docket treatment. (Stats. 2016, ch. 628, § 1.)

The Legislature's Fix: A Fast-Track Appeal.

One proposed legislative solution to the perceived problem was to eliminate the right of immediate appeal from an order refusing to compel arbitration in an elder abuse case where the trial court has granted a trial preference. The arguments for this were that there is no comparable right of immediate appeal from an order granting a petition to compel arbitration. The aggrieved party should either file a writ petition for extraordinary relief, which rests entirely within the discretion of the reviewing court, or await review as a matter of right on appeal from a final judgment. Because a trial preference has been granted, the case should go to trial within 120 days, long before an appeal is usually heard.

The Legislature did not go so far as to eliminate the right of immediate appeal, but it did speed up the appellate process dramatically and place potential appellants in a difficult spot. New Code of Civil Procedure section 1294.4, effective January 1, 2017, mandates that where an action involves an elder abuse claim (Welf. & Inst. Code, § 15600 et seq.) and a trial preference has been granted (Code Civ. Proc., § 36), the Court of Appeal shall decide the appeal within 100 days after the filing of the notice of appeal. The Court of Appeal may extend the time for decision, but only for good cause and if it would promote the interests of justice.

The Judicial Council Implements The Fix With Dramatically-Shortened Deadlines.

Code of Civil Procedure section 1294.4 left it to the Judicial Council to formulate rules implementing the statute and shortening the time for filing the appeal. The result is a new chapter 12 to part 8 of the California Rules of Court, rules 8.710-8.717, effective July 1, 2017.

Unlike the usual measured pace of the appellate process, the new rules call for extremely rapid action, as the Legislature directed. Traps for the unwary lurk all along the way.

Shortened time to appeal. The time to file the notice of appeal is not the usual 60 days (rule 8.104), but just 20 days from notice of entry of the order denying the petition to compel arbitration (rule 8.712(b)). A valid reconsideration motion will extend the time to appeal for only 5 days after service of notice of entry of the order denying reconsideration. (Rule 8.712(c)(1).) Any other party may

cross-appeal from the order denying arbitration, but only within 5 days after the clerk serves notification of the first appeal. (Rule 8.712(c)(2).)

Unlike a standard notice of appeal, this one must state that the appeal is governed by the new rules, and copies of the order appealed from and the order granting a trial preference must be attached. (Rule 8.712(a).)

Rapid record preparation. There will be none of the typical delays in preparation of the record on appeal. At the same time the appellant files a notice of appeal, the appellant must also file notice either stating that the appellant elects to proceed without a reporter's transcript or designating a reporter's transcript. (Rule 8.713(b)(1).) The reporter must prepare the transcript within 10 days after the superior court clerk notifies the reporter to prepare the transcript. (Rule 8.713(b)(2).) And there is no waiting for the superior court clerk to do anything else. The appeal must proceed by way of an appendix or appendices in lieu of a clerk's transcript, which are filed with the briefs. (Rule 8.713(a).)

Briefs filed lickety-split. Unless the Court of Appeal orders otherwise, the appellant must file its opening brief within 10 days after filing the notice of appeal. (Rule 8.715(a)(1).) The respondent must file its brief within 25 days after that. (Rule 8.715(a)(2).) And the appellant may file a reply brief within 15 days after that. (Rule 8.715(a)(3).)

There is a novelty in preparation of briefs that would not be tolerated in the usual appeal. If a reporter's transcript has not been filed at least 5 days before the date a brief is due, the brief may be filed with references to matters in the reporter's transcript but without supporting citations. Within 10 days after the reporter's transcript is filed, a revised version of the brief must be filed with the missing reporter's transcript citations, but no other changes. (Rule 8.715(b)(2).)

If a party fails to file a brief on time, the Court of Appeal clerk gives notice that if the brief is not filed within a mere 2 court days of service of the notice (the usual rule is 15 days), then (1) in the case of an appellant's opening brief, the court may dismiss the appeal, and (2) in the case of a respondent's brief, the court may decide the appeal on the record, the opening brief, and any oral argument. (Rule 8.715(d).)

The parties may still stipulate to extend briefing deadlines under rule 8.212(b) (up to 60 days for each brief), and that will also extend the court's 100-day time for deciding the appeal by the number of days of the extension(s). (Rule 8.715(c).) Presumably, elderly or infirm litigants who already have a trial preference will not enter into such stipulations lightly.

Oral argument in a flash. The Court of Appeal need give only 10 days' notice of oral argument, or less if the court finds good cause. (Rule 8.716.)

Some extensions allowed. Some of the draconian aspects of this rocket-docket appeal process may be ameliorated by rule 8.717, which provides: "The Court of Appeal may grant an extension of time in appeals governed by this chapter only if good cause is shown and the extension will promote the interests of justice." It remains to be seen how liberal the Courts of Appeal will be in granting extensions.

It also remains to be seen whether rule 8.717 would permit the Court of Appeal to extend the time to file a notice of appeal as specified by rule 8.712(b). In appeals not governed by new chapter 12, "no court may extend the time to file a notice of appeal." (Rule 8.104(b).) There is no similar rule in new chapter 12.

Appellants Thus Find Themselves Between A Rock And A Hard Place.

The Legislature has not done away with appeals from orders refusing to compel arbitration in elder abuse cases with a trial preference, but it has made the process far more challenging than the usual appeal. Perhaps as an unintended consequence, the Legislature has put a party aggrieved by an erroneous order refusing to compel arbitration between a rock and a hard place. The onerous fast-track appellate process must be followed, or the right to appellate review of the order will be forfeited. Because the order remains immediately appealable, it cannot be reviewed on appeal from a subsequent final judgment. (Code Civ. Proc., § 906.)

If you find yourself in a dispute over the enforceability of an arbitration clause in an elder abuse case, study the new appellate rules right away, and if you are aggrieved by an order dismissing or denying a petition to compel arbitration, be prepared to act swiftly.

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